In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	
ALFREDO E. SUAREZ	)	
(Chapter 11 Case 91-20276)	)	
	)	
Debtor	)	
	)	
	)	
	)	
ALFREDO E. SUAREZ	)	Adversary Proceeding
	)	
Plaintiff	)	Number 92-2009
	)	
	)	
	)	
v.	)	
	)	
LIGIA SUAREZ	)	
	)	
Defendant	)	
	)	
	)	
and		
	)	
	)	
ALFREDO E. SUAREZ	)	Adversary Proceeding
	)	
Plaintiff	)	Number 92-2013
	)	
	)	
	)	
v.	)	
	)	
RICHARD D. PHILLIPS	)	
and	)	
EMMETT P. JOHNSON	)	
	)	
Defendants	)	

MEMORANDUM AND ORDER

On April 24, 1992, a hearing was held on Plaintiff's Complaint to Determine Dischargeability of a Debt pursuant to 11 U.S.C. Section 523(a)(5). The counterclaim of Defendant, Ligia Suarez was dismissed by an order of this court on October 2, 1992. Upon consideration of the evidence adduced at the April hearing, the briefs submitted by the parties, and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Plaintiff filed his Chapter 11 petition on April 2, 1991. Plaintiff is an individual debtor and a medical doctor in private practice. Defendant, Ligia Suarez, is Plaintiff's ex-wife and a creditor in this Chapter 11 case. Plaintiff's obligations to the Defendant/ex-wife arise out of a divorce decree, which awarded alimony, child support, and property division.

On February 10, 1992, Plaintiff filed an adversary proceeding against Defendant/ex-wife to determine the dischargeability of obligations set forth in the divorce decree. (Adversary Proceeding No. 92-2009). *See* 11 U.S.C. §§523(a)(5) and 1141(d)(2). Plaintiff also filed an adversary proceeding against the attorneys of the former spouse to determine the dischargeability of the attorneys' fees awarded in connection with the divorce proceedings. (Adversary Proceeding No. 92-2013).

In her answer filed March 10, 1992, Defendant/ex-wife alleged that her entire claim should be treated as a non-dischargeable support obligation and requested relief from the automatic stay to enforce that obligation. Defendant/ex-wife also alleged that Plaintiff committed various acts under Section 727 of the Bankruptcy Code which should be sufficient to deny Debtor a discharge. Defendant's counterclaim based on Section 727(a) was dismissed by an order of this court on October 2, 1992, with the proviso that Defendant would be permitted to introduce evidence of Section 727 violations and lack of good faith at any hearing or confirmation of Debtor's Chapter 11 plan.

The Defendant's attorneys in the divorce proceeding filed an answer in the separate adversary against them on April 10, 1992, alleging that their attorneys' fee award should be classified as a non-dischargeable support obligation and not dischargeable property division.

At the April 24th hearing, the adversary proceeding against Defendant/ex-wife and the separate proceeding against her divorce attorneys were consolidated for the purpose of presenting evidence at the hearing. This order decides the issues presented in both adversary proceedings.

Plaintiff and Defendant were married in 1972 and had five children, including adopted children. Defendant testified that she had lived with Plaintiff since 1965. Plaintiff and Defendant are from Columbia where they lived until they moved to the United States in 1972. Plaintiff opened his medical practice in Baxley, Georgia, in 1977. *See* Amended Disclosure Statement filed February 26, 1992.

In 1984, the parties separated and Defendant filed for separate maintenance and support. On May 6, 1985, the Superior Court of Appling County entered a temporary order awarding custody of the children, temporary alimony, and child support to Defendant. The parties were divorced by a Final Judgment and Decree of the Appling County Superior Court on March 14, 1990, after two jury trials.

The second and final jury trial of the divorce action ended on October 23, 1989, with the announcement of the jury's verdict. The verdict was filed with the Superior Court on October 26, 1989. A judgment on the jury verdict was filed on March 14, 1990. Dr. Suarez petitioned the Supreme Court of Georgia for a discretionary appeal which was denied on January 14, 1991. Thus, the jury verdict became final on January 14, 1991. Debtor's bankruptcy petition was filed approximately three months later.

The jury's verdict form provides the following information:

> AS TO DIVISION OF PROPERTY
>
> A. WE THE JURY AWARD MRS. SUAREZ THE FOLLOWING:
>
> Pine Forrest House & Furnishing (excepting Crucifix)-Dr. Suarez pays off mtg.
> Blueberry Farm and Acreage (170+ acres) - He pays off Fed. Land Bank or other mortgage
> Her car (Volvo)
> $51,000 cash settlement (for ½ share of Keough Plan)
> $19,000± in Suarez Farm Account at Peoples State Bank and Trust.
> Mrs. Suarez will receive clear title to properties and will be responsible for taxes accruing from today forward as well as maintenance and insurance from

now on.

Dr. Suarez is responsible for any taxes accrued to date.

Dr. Suarez must also maintain $200,000 life insurance with Mrs. Suarez as sole beneficiary (with their children receiving benefits . . .)[1]

Dr. Suarez will be responsible for keeping up major medical insurance for Mrs. Suarez and all children (as long as they (children) are dependents). Mrs. Suarez is entitled to this insurance as long as she receives alimony.

B. WE THE JURY AWARD MR. SUAREZ THE FOLLOWING:

Crucifix (Wooden Cross)
Office on North Blvd. with all fixtures, furnishings, & equipment.
Fancy Bluff Acreage
Athens house (equity), His interest in Keel property
All vehicles except her Volvo. Keough Plan property
Robinson Humphries Acct., Suarez Acct. (6,000±), DOT/Suarez Acct.

See Verdict Form, Plaintiff's Exhibit "1". The jury also found that Mrs. Suarez was entitled to periodic alimony in the amount of $2,000.00 per month "until Mrs. Suarez reaches age 64 or until she remarries." *See* Verdict Form, Plaintiff's Exhibit "1". The verdict also provides for child support in the amount of $2,000.00 per month, which decreased when the minor son reached 18 to $1,500.00 per month and terminates when the minor daughter, the last child at home, turns 18. The Superior Court entered a Final Judgment and Decree jury verdict on March 14, 1990. (Plaintiff's Exhibit "2").

[1] The last sentence on the verdict form is not legible. However, the judgment on the jury's verdict explains that Plaintiff is to maintain the life insurance policy with his ex-wife as sole beneficiary and the minor children as contingent beneficiaries. *See* Final Judgment and Decree, p.3.

The jury's verdict was returned in Court on October 23, 1989. A portion of the October 23, 1989, transcript was admitted into evidence at the April hearing. *See* Plaintiff's Exhibit "8". This part of the transcript includes questions to the court and the jury foreman to clarify the jury's verdict. The Superior Court Judge asked the jury foreman to explain the KEOGH plan award. According to the jury foreman:

> It was the consensus of the jury that she [Defendant/ex-wife] should have half of that retirement, it be in cash or put into another retirement plan. We assumed that that was cash money in the plan and to give her half of it . . . . He could pay her out of some other funds, an equal amount.

See Transcript pp.742, 743, Plaintiff's Exhibit "8". Thus, the jury provided that Plaintiff was to pay Defendant half of the value of the Keogh plan, $51,000.00 of the $102,000.00 Keogh plan, and could pay her cash without having to withdraw the funds from the Keogh plan and incur taxes and penalties by doing so.

Subsequent to the entry of the Final Judgment and Decree, Defendant and her attorneys applied to the trial judge for an award of attorneys' fees pursuant to O.C.G.A. Section 19-6-2(a)(1) and (2). The Superior Court ordered Plaintiff to pay Defendant's attorneys' fees in the amount of $14,000.00 at the rate of $500.00 per month with interest at the rate of 7%. As of the date of the April hearing, Defendant's attorneys were owed $13,400.33.

Plaintiff contended in this proceeding that Dr. Suarez's liability for all

monetary awards to Mrs. Suarez should be discharged. Those include: (1) The mortgage on the farm; (2) the home mortgage; (3) the cash award of $51,000.00; and (4) the balance on the farm account, approximately $19,000.00. Plaintiff also claims that the attorneys' fees obligation should be discharged.

The Plaintiff admits that the $2,000.00 per month alimony award is in the nature of support and is non-dischargeable. Plaintiff also admits that the child support is non-dischargeable. Plaintiff further admits that the obligation to provide medical insurance is a non-dischargeable support obligation. Plaintiff also admits that the $22,000.00 arrearage on alimony and child support is a non-dischargeable support obligation to be paid in Debtor's plan.

At the time of the divorce, Defendant was a forty-nine year old mother with two children at home. She had no income from employment or investments and relied on alimony and child support from her husband. Defendant could speak very little English and testified that her divorce attorneys had difficulty communicating with her. Defendant has had little education and has no work experience in the United States. Defendant had not worked since 1972, before she moved to the United States because her former husband wanted her to stay at home with the children. Defendant has no prospects for future employment. Defendant has no savings, jewelry, or other assets to sell to support herself. Defendant testified that Plaintiff placed all assets acquired during the marriage in his name only.

Defendant testified that the amount awarded to her expressly as alimony was

not sufficient to meet her living expenses. Defendant testified that she needed Plaintiff to pay the mortgage on the home in order to maintain a place to live.

Defendant testified further that she persuaded Plaintiff to buy the blueberry farm as a source of income because she had no other skills or employment opportunities.

Plaintiff's tax returns showed that the blueberry farm operated at a loss of approximately $24,395.00 prior to the divorce. *See* Plaintiff's 1989 Tax Return, Plaintiff's Exhibit "6". Defendant argued that she needed the money in the farm account, approximately $19,000.00, in order to finance the blueberry farm operation and turn it into an income producing asset. Defendant owns no equipment to operate the farm and it was argued that Plaintiff had taken the tractor, irrigation equipment, and other needed items with him.

Defendant introduced into evidence portions of Plaintiff's tax returns for 1987, 1988, 1989, and 1990. *See* Defendant's Exhibits 1, 2, 3, and 4. The parties stipulated to the admissability of the tax returns. The jury's verdict was rendered on October 23, 1990. As the 1990 tax return reflects income and ability to pay after the date of the support award it shall not be considered. Debtor's income and ability to meet support obligations after the date of the divorce and/or support award is irrelevant and inadmissable under binding Eleventh Circuit authority. *See* In re Harrell, 754 F.2d 902 (11th Cir. 1985).

Plaintiff's tax returns show that Plaintiff had an average income of approximately $148,500.00 before deducting $8,500.00 per year for malpractice insurance.

Plaintiff showed that his annual business expenses were approximately $62,000.00,[2] including the malpractice insurance. Thus, Plaintiff's net income before considering support obligations was $86,500.00. Plaintiff's accountant testified that approximately $7,000.00 in tax withholdings would be refunded. After subtracting annual alimony and support obligations of $48,000.00 from income of $86,500.00 Defendant's net income was $38,500.00, plus excess tax withholdings of $7,000.00 for a total of $45,500.00 in annual income, before considering the obligations to make debt service payments on property awarded to Defendant or payment of his own debt service. The cost of maintaining health and life insurance as required by the decree amounts to $5,000.00 per year, thus Debtor's income (net) was $40,500.00.

Plaintiff's court ordered obligations to make debt service on behalf of the wife include the $68,839.00 mortgage on the farm, which is repayable at approximately $9,000.00 annually, and the mortgage on the marital home of $29,478.00, which is payable at approximately $580.00 per month. Debtor's lump sum obligations include the $51,000.00 award in lieu of a one-half interest in the Keogh plan, the $19,000.00 farm account balance, and $6,000.00 in annual payments on Defendant's attorneys' fees.

Plaintiff calculated his payment obligations, on a five year pay out, to equal $39,690.00 annually, nearly all of his available income. However, nothing requires Plaintiff to pay all of his support obligations in such a short period of time. His annual payments on the house, farm and attorneys' fees would be approximately $22,000.00. Plaintiff could

[2] The figure testified to at trial was $81,000.00. However, that included $19,000.00 in anticipated annual payments to the Internal Revenue Service to retire a delinquent tax obligation and thus is not an accurate reflection of Debtor's current income and expenses.

certainly extend the payments on the $51,000.00 award and the $19,000.00 award over a period longer than five years. This would reduce Plaintiff's monthly debt service payments.

In analyzing the stream of income under the decree as a tool in gleaning the "actual . . . nature" of the award it is important to note that not all the foregoing obligations will be paid for life or even until Debtor reaches age 65. While the evidence on this point was somewhat imprecise I can project the effective net income (in round figures) as follows:

Date of Decree:

	Mrs. Suarez		**Dr. Suarez**	
	$24,000.00 (alimony)		$40,500.00	
	$24,000.00 (child support)	Less Annual Attorney Fee Payment	$ 6,000.00	
Totals	$48,000.00		$34,500.00	

After 14 Months
(attorney's fee paid)

	$48,000.00		$40,500.00	

Date of Bankruptcy:
(1st child now 18)

	$42,000.00		$46,500.00	
Add House Payment	$49,000.00		$39,500.00	
Add Farm Payment	$58,000.00		$30,500.00	

(2nd child reaches 18 - date unknown)

	pre-64	**post-64**	**pre-64**	**post-64**
	$40,000.00	$16,000.00	$48,500.00	$72,500.00*
Farm Payment Discharged	$31,000.00	$ 7,000.00	$57,500.00	$81,500.00*
Both Payments Discharged	$24,000.00	000	$64,500.00	$88,500.00*
				**until retirement*

While the income disparity appears large prior to the youngest child reaching the age of majority the total is remarkably close to the evidence in the domestic trial that her budget needs with children totalled $4,600.00 per month or $55,200.00 and without the children $3,300.00 per month or $39,600.00.

Ultimately when the parties reach retirement age the periodic alimony paid to Mrs. Suarez would cease, and upon payment of the mortgages the parties would hold unencumbered assets as follows (valued as of the date of the divorce):

Mrs. Suarez		**Dr. Suarez**	
Home	$30,000.00+	Fancy Bluff	$120,000.00
Farm	$70,000.00+	Office	$ 45,000.00

Cash	$70,000.00	Keogh	$102,000.00
Totals	$170,000.00		$267,000.00

In response to Plaintiff's contentions that the jury award is excessive in light of his annual net income, Defendant emphasized Plaintiff's ability to pay from the Keogh plan and equity in the real properties awarded to him, as opposed to monthly payments from his income. Plaintiff testified that he paid $120,000.00 for the Fancy Bluff property awarded to him and owed $12,000.00 on the property leaving $108,000.00 in equity. Defendant showed that Plaintiff's office was valued at $45,000.00 with a debt of $10,000.00. Similar equity estimates are reflected in Plaintiff's liquidation analysis on his amended disclosure statement. *See* Amended Disclosure Statement filed February 26, 1992. It does not appear from the evidence that Plaintiff had any equity in the other properties awarded to him. At the time of the divorce and alimony award, the Keogh plan was worth $102,000.00. Therefore, Plaintiff's equity in the real properties plus the Keogh plan was $245,000.00, an amount more than sufficient to pay all obligations on property awarded to Defendant.[3]

Plaintiff's Chapter 11 plan is substantially a liquidation plan, which proposes the sale or surrender of all of Plaintiff's real property. *See* Debtor's Plan of Reorganization filed February 26, 1992. *See also* Memorandum and Order on Motion for Partial Judgment on the Pleadings filed October 2, 1992.

[3] It is interesting to note here that Debtor originally listed on his petition the value of his Keogh plan at $100,000.00. *See* Debtor's petition filed April 2, 1991. However, just over one year later Debtor amended his petition to show the value of the Keogh plan as $142,000.00. *See* Amendment to Petition filed May 18, 1992. It is unknown whether his original schedules were inaccurate or whether he has contributed to the plan post-petition.

Plaintiff's plan provides that the properties awarded to Plaintiff were not necessary for his reorganization. Plaintiff has closed his office in Baxley, sold his property there, and has moved to Macon where he is employed by another doctor. No evidence was presented on the use or purpose of the Fancy Bluff and Keel properties awarded to Plaintiff, which apparently have been sold or surrendered. Mrs. Suarez testified that the Athens house was purchased to provide their children a place to live while attending college. This property had no equity and has been foreclosed upon or surrendered. Although Plaintiff's current ability to pay is not to be considered, the Debtor's liquidation plan is consistent with Defendant's argument that the jury considered Plaintiff's equity in the property awarded to him and the possibility of Plaintiff liquidating his assets in order to pay his obligations to Defendant.

CONCLUSIONS OF LAW

A. Alimony vs. Property Division

Section 523(a)(5) of the Bankruptcy Code creates an exception to discharge of any debt

> . . . to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record . . . designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. §523(a)(5). There is ample compelling authority in the Eleventh Circuit and the Southern District of Georgia interpreting and applying 11 U.S.C. Section 523(a)(5).[4] The Eleventh Circuit mandates that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state laws." Harrell, 754 F.2d at 905 (quoting H.R.Rep.No. 595, 95th Cong., 1st Sess. 364 (1977) reprinted in 1978, U. S. Code Cong. & Admin. News 5787, 6319). To be declared non-dischargeable, the debt must have been actually in the nature of alimony, maintenance, or support. Harrell, 754 F.2d at 904.

The non-debtor spouse has the burden of proving that the debt is within the exception to discharge. Long v. Calhoun, 715 F.2d 1103 (6th Cir. 1983).

A determination as to whether or not a debt is in the nature of support requires an examination of the facts and circumstances existing at the time the obligation was created, not at the time of the bankruptcy petition. Harrell, 754 F.2d at 906.[5] Accord Sylvester v. Sylvester, 865 F.2d 1164 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987); Draper v. Draper, 790 F.2d 52 (8th Cir. 1986); Long v. Calhoun, 715 F.2d 1103 (6th Cir. 1983). It is the substance of the obligation which is dispositive, not the form, characterization, or designation of the obligation under state law. Bedingfield, 42 B.R. at 645-46. Accord Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); Williams v. Williams, 703 F.2d 1055, 1057 (8th Cir. 1983); Calhoun, 715 F.2d at 1109; Pauley v. Spong,

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[4] In re Harrell, 754 F.2d 902 (11th Cir. 1985); Matter of Crist, 632 F.2d 1226 (5th Cir. 1980); cert. denied, 451 U.S. 986 (1981) cert. denied, 454 U.S. 819 (1981); In re Holt, 40 B.R. 1009 (S.D.Ga. 1984) (Bowen, J.); In re Bedingfield, 42 B.R. 641 (S.D.Ga. 1983) (Edenfield, J.).

[5] Harrell overrules Bedingfield only to the extent that it held that "the bankruptcy courts may examine the debtor's ability to pay . . . at the time of the bankruptcy proceeding." Bedingfield, 42 B.R. at 646. The Eleventh Circuit in Harrell concluded that only the facts and circumstances at the time the decree or agreement was entered are to be considered. Harrell, 754 F.2d at 906-907.

661 F.2d 6, 9 (2nd Cir. 1981).

According to the Eleventh Circuit in Harrell:

> The language used by Congress in Section 523(a)(5) requires bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is 'actually in the nature of alimony, maintenance, or support.' The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support.

Harrell, 754 F.2d at 906 (emphasis original). Although the Harrell Court determined that only "a simple inquiry" was needed, the Court did not set forth the guidelines or factors to be considered. The Bankruptcy Court may consider state law labels and designations although bankruptcy law controls. According to the District Court in Bedingfield:

> While it is clear the Congress intended that federal law not state law should control the determination of when a debt is in the nature of alimony or support, it does not necessarily follow that state law must be ignored completely . . . the point is that bankruptcy courts are not bound by state law where it defines an item as alimony, maintenance or support, as they are not bound to accept the characterization of an award as support or maintenance which is contained in the decree itself.

42 B.R. at 645-46 (citations omitted); Accord Spong, 661 F.2d at 9.

The Bankruptcy Court must determine if the obligation at issue was intended

to provide support. Calhoun, 715 F.2d at 1109. In making its determination, the Court should "consider any relevant evidence including those facts utilized by state courts to make a factual determination of intent to create support." Id. If a divorce decree incorporates a settlement agreement, the Court should consider the intent of the parties in entering the agreement; if a divorce decree is rendered following actual litigation, the Court should focus upon the intent of the trier of fact. In re West, 95 B.R. 395, 399 (Bankr. E.D.Va. 1989). Where the parties have submitted the issues of alimony and property division to a jury, the bankruptcy court should determine the intent of the jury in making the award. Matter of Long, 794 F.2d 928, 931 (4th Cir. 1986) (Deciding the intent of a Georgia jury). *See also* Matter of Myers, 61 B.R. 891 (Bankr. N.D.Ga. 1986). Labels used by a jury are not, standing alone, controlling, but are entitled to deference where the trier of fact has been informed of the difference between alimony and property division and has used the labels in making its award. Long, 794 F.2d at 931. *See also* In re Hall, 40 B.R. 204, 206 (Bankr. M.D.Fla. 1984) (Characterization of an award in state court is entitled to greater deference when based on findings of fact and conclusions of law of a judge as opposed to a rubber stamped agreement incorporated into a divorce decree); In re Helm, 48 B.R. 215, 225 (Bankr. W.D. Ky. 1985) ("It is not those questions of support which have been fully litigated and adjudicated in the state court system which are now subject to second-guessing by bankruptcy judges, sitting as 'super-divorce courts.' It is only those cases . . . in which former spouses settle their support differences by agreement (albeit with resulting state court approval), that bankruptcy courts may later reopen and re-examine.")

In Matter of Hall, 51 B.R. 1002 (S.D.Ga. 1985), the District Court affirmed the Bankruptcy Court's finding that military retirement, awarded by a jury as an equitable

division of property, was actually in the nature of support and non-dischargeable. Mrs. Hall was awarded a 38% share of her husband's military retirement to be paid directly to her by the government. The jury labeled the award as an "equitable division of property."

The Bankruptcy Judge determined that the direct payments to Debtor's former wife were not "debts" of the debtor but should be considered a vested property interest. Also, as the government was liable for the direct payments to Mrs. Hall, the Court concluded that the Debtor was not liable on a claim or debt. Additionally, the Court concluded that the payments were actually in the nature of support and should be non-dischargeable. The District Court affirmed. According to the District Court, the Bankruptcy Court "properly considered whether the state court's equitable division of the pension was in fact an award in the nature of support." Id. at 1004.

In the instant case, Plaintiff argues that the Court must look to the unambiguous terms of the decree in deciding whether an obligation is alimony or property division. Defendant cites Matter of Clark, 113 B.R. 797 (S.D.Ga. 1990).[6] In that case Judge Bowen affirmed the holding of the Bankruptcy Judge that a Debtor's obligation to make mortgage payments on the residence awarded to his former wife was dischargeable. The Bankruptcy Judge examined only the unambiguous terms of the settlement agreement in which the former spouse specifically waived her right to alimony. Debtor's ex-wife argued on appeal that she gave up her right to "alimony" in exchange for her husband's promise to pay the mortgage obligation. According to the former spouse, the parties' intent could not

[6] Clark v. Clark (In re Clark), 105 B.R. 753 (Bankr. S.D.Ga. 1989), aff'd 113 B.R. 797 (S.D.Ga. 1990), vacated and remanded, 925 F.2d 1476 (11th Cir. 1991) (table).

be determined from the face of the agreement. The District Court affirmed concluding that the Bankruptcy Judge's findings were not clearly erroneous.

However, the Clark decision was reversed in part and vacated in part by the Eleventh Circuit in an unpublished opinion at 925 F.2d 1476 (11th Cir. 1991) (table). Although the Eleventh Circuit did not publish a formal opinion, its act suggests that the trier of fact should have taken into consideration other factors besides the express terms of the agreement. On remand, the Bankruptcy Judge discovered a jurisdictional problem concerning the timeliness of filing the Notice of Appeal and certain motions and recommended that the District Court withdraw reference of the adversary proceeding pursuant to 28 U.S.C. Section 157(d). *See* Order and Recommendation to the District Court, Chapter 7 Case No. 88-11590, Adversary Proceeding No. 89-1002 (Bankr. S.D.Ga. January 24, 1992). The case is currently before the District Court for its consideration of the jurisdictional issues. As the Clark case is not final, I decline to follow it.

Labeling of an obligation is not conclusive as the Bankruptcy Court must determine dischargeability based on the substance and function of the obligation instead of form. In re Youngman, 122 B.R. 612, 614-15 (Bankr. N.D.Ga. 1991). *See also* In re Bedingfield, 42 B.R. 641, 646 (Bankr. S.D.Ga. 1983). The obligation should have the effect of providing necessary support to the former spouse and any children of the marriage. Calhoun, 715 F.2d at 1109.

The Bankruptcy Court should use the following factors to determine if an award is actually in the nature of support:

1) The amount of alimony, if any, awarded by the state court and the adequacy of any such award;

2) The need for support and the relative income of the parties at the time the divorce decree was entered;

3) The number and age of children;

4) The length of the marriage;

5) Whether the obligation terminates on death or remarriage of the former spouse;

6) Whether the obligation is payable over a long period of time;

7) The age, health, education, and work experience of both parties;

8) Whether the payments are intended as economic security or retirement benefits;

9) The standard of living established during the marriage.

In re Hart, 130 B.R. 817, 836-837 (Bankr. N.D. Ind. 1991). The above factors are to be used as a guideline and should not be considered as legal criteria to be examined or required in every case. In re Schweig, 105 B.R. 140, 144 (Bankr. Dist. Col. 1989); In re Jackson, 102 B.R. 524, 531 (Bankr. M.D.La. 1989).

To constitute support, a payment provision must not be manifestly unreasonable taking into consideration all provisions of the decree and the economic situation of the parties at the time of the divorce decree. Calhoun, 715 F.2d at 1110. "Property division" which is declared to be actually in the nature of support should be non-dischargeable only to the extent that the payments provide necessary support. In re Brody,

120 B.R. 696, 704 (Bankr. E.D.N.Y. 1990). *See also* In re Youngman, 122 B.R. 612, 615 (Bankr. N.D.Ga. 1991) (Where the facts and circumstances show that the parties intended part of the mortgage payment to be for support, that part of the payment should be non-dischargeable support and the balance of the payment should be considered a dischargeable division of property).

In the case at bar, the jury verdict clearly delineated alimony and "property division" provisions. As to the express alimony and child support provisions there is no dispute. In the "Division of Property" section, the jury awarded six items of property to Defendant and eleven items to Plaintiff. Plaintiff apparently had made several investments and was awarded real property including his office and furnishings, the Fancy Bluff property, the Crucifix, and the Athens house. Plaintiff was also awarded all cars except Defendant's Volvo, and four bank accounts, including the Keogh plan. Defendant was awarded the marital home and furnishings, the blueberry farm, the Volvo automobile, the $51,000.00 cash settlement and the $19,000.00 in the farm account. In addition to listing the real property awarded to Defendant, the jury specifically wrote beside the property award that "Dr. Suarez pay off mortgage" on the home and "he pays off Federal Land Bank or other mortgage" on the farm. *See* Plaintiff's Exhibit "1". If the jury had merely divided the property without placing this specific obligation upon Plaintiff, one might reasonably infer that the jury intended for Defendant to pay the mortgage out of her monthly alimony payments.

Here, the jury expressly awarded periodic alimony and ordered the payment of certain obligations denominated as property division. Because the burden of proof is

upon the non-debtor and because the jury placed the mortgage payment obligations under "Division of Property" Mrs. Suarez must show that the amounts received are actually in the nature of support. This "simple inquiry" is seldom bereft of uncertainty and particularly so in a case such as this where the sums awarded are large and where they fluctuate over time. The starting point is the verdict itself which denominates the house and farm mortgage payments as property division. Clearly this designation is entitled to great weight when the case has been tried before a jury and not designated only in a private settlement document. Long, supra. However, if the award has the effect of providing necessary support it may be nondischargeable even if denominated as a property division.

I conclude that Mrs. Suarez has met her burden. Considering the length of the marriage, the needs of the wife and children, the relative earning capacity of the parties, and the apparent effort by the jury to equalize the income available to the parties, I conclude that all obligations in issue were in the nature of support and that the award was not manifestly unreasonable. Plaintiff's obligations to pay off the mortgages on the marital home and the blueberry farm are actually in the nature of support and are not dischargeable. As outlined above, the payment obligations in the first few years are very onerous for Dr. Suarez but as the attorney fee award is paid and the children reach age 18 the income clearly shifts back in his favor. ($48,500.00 for him and $40,000.00 for her). If the mortgage payments are discharged, she would be left with total income of only $24,000.00 and debt service alone of over $16,000.00 with no skills to earn a living. Clearly, the mortgage payment provision is necessary for her support.

The jury decided that Defendant's alimony is to cease when she becomes 64

years old. Both parties testified that they had concerns about Plaintiff's ability to work as he grew older. It appears that the jury expected Plaintiff's income from practicing medicine to cease when the parties reached their sixties and contemplated that Plaintiff and Defendant would be required to live off their investments including the proceeds of his Keogh Plan which was, in effect, split fifty-fifty as of the date of the decree. I conclude that the jury's award of half of the Keogh plan is a non-dischargeable support obligation. *See* Hall, 51 B.R. at 1004.

Defendant testified that the $19,000.00 farm account was needed to buy supplies and equipment to operate the farm and earn income. Defendant had no other income or assets to finance farm operations. I conclude that the jury award of $19,000.00 was in the nature of support to Defendant and that this obligation is non-dischargeable.

In light of the foregoing, I hold that the obligation to pay the mortgage on the home, the mortgage on the farm, the $51,000.00 cash settlement, and the $19,000.00 farm account balance are all non-dischargeable obligations.

B. Attorney's Fees

A majority of courts have found attorney's fees awarded pursuant to a divorce decree to be non-dischargeable as in the nature of support. In re Henry, 110 B.R. 608 (Bankr. N.D.Ga. 1990); In re Booch, 95 B.R. 852 (Bankr. N.D.Ga. 1988); Matter of Myers, 61 B.R. 891 (Bankr. N.D.Ga. 1986). In a prior case I determined that the award of attorney's fees by the state court in a divorce proceeding is generally based upon the same

consideration as an award of alimony, i.e., need and ability to pay. *See* Matter of Amentrout, Chapter 7 No. 90-20323, Adv. No. 90-2023, slip op. at 6 (Bankr. S.D.Ga. May 24, 1991). *See also* Henry, 110 B.R. at 610 ("Financial need of the non-debtor spouse at the time of the award of attorney's fees is relevant to deciding whether the award is in the nature of alimony, maintenance or support within the meaning of Section 523(a)(5)").

According to the Bankruptcy Court in Henry:

> The proper approach under federal bankruptcy law is to determine whether the debt for the ex-spouse's attorney's fees was intended, at the time of the decree, to be part of the division of property, or part of the ex-spouse's support and maintenance. This determination must be made in light of all the facts and circumstances relevant to the intent of attorney's fee award.

Id. at 610. Defendant/ex-wife had no other means of support or income, besides her husband's income, at the time of filing her divorce. Her attorneys were successful in obtaining a jury verdict which awarded alimony and support to Defendant. From the evidence presented, I conclude that the Superior Court awarded the attorney's fees as support for Defendant. Thus, the attorneys' fee award of approximately $13,400.33 is in the nature of support and is non-dischargeable in this adversary proceeding.

Defendant has filed a Motion for Relief from Stay. I conclude that the Motion should be granted to permit enforcement of all payment obligations that have come due since the filing of the Debtor's petition to the extent of the $2,000.00 per month in periodic alimony and $1,500.00 per month in child support, together with the attorney's fees

award of $500.00 per month. In Carver v. Carver, 954 F.2d 1573 (11th Cir. 1992), the Eleventh Circuit concluded that "such relief [from stay] should be liberally granted in situations involving alimony, maintenance, or support in order to avoid entangling the federal court in family law matters best left to state court." Carver, 954 F.2d at 1578. The Eleventh Circuit in Carver concluded that children should not have to wait on a Chapter 13 confirmation to enforce their state law support rights and cited Caswell v. Long, 757 F.2d 608, 610 (4th Cir. 1985) with approval. Caswell held that child support arrearages may not be included in a Chapter 13 plan. All other post-petition obligations that are in default may be dealt with in Debtor's plan if an amendment is filed within thirty (30) days from the date of this order. Stay relief as to those obligations will be considered at a final hearing should one be requested by either party.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that a final hearing on Defendant's Motion for Relief from Stay is continued and will be heard on request of a party in interest. Relief from stay is granted on an interim basis to the extent set forth above.

ORDERED FURTHER that the obligations of Alfredo E. Suarez to Ligia Suarez for payment of the marital home mortgage, the blueberry farm mortgage, the $51,000.00 cash settlement, and the $19,000.00 farm account balance are non-dischargeable in Adversary Proceeding No. 92-2009.

ORDERED FURTHER that the obligation of Alfredo E. Suarez to Richard D. Phillips and Emmett P. Johnson for attorney's fees is non-dischargeable in Adversary Proceeding No. 92-2013.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of December, 1992.